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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 04 220 51689

OFFICE: TEXAS SERVICE CENTER Date:

OCT 04 2006

IN RE:

Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was initially approved by Citizenship and Immigration Services (CIS) on August 17, 2004. Pursuant to severely adverse information discovered abroad by a U.S. consular officer, the Director, Texas Service Center, properly issued a notice of intent to revoke the prior approval of the petition for a nonimmigrant visa. The director ultimately revoked the approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner was organized in the State of Florida in 2002 and claims to be operating as a staffing employment agency. The petitioner states that it is an affiliate of [REDACTED] located in Uzbekistan. The petitioner claims that it is not a new office and indicates that it has been operating since the year of its inception. It seeks to employ the beneficiary as a new employee for a period of three years. The director revoked the approval of the petitioner's Form I-129 based on the determination that the petitioner failed to overcome the adverse evidence cited in detail in the notice of intent to revoke.

On appeal, counsel vehemently disputes the adverse information and the director's decision to revoke a previously approved visa petition.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

With regard to issuing a notice of intent to revoke, 8 C.F.R. § 214.2(l)(9)(iii)(A) states the following:

The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he/she finds that:

- (1) One or more entities are no longer qualifying organizations;
- (2) The alien is no longer eligible under section 101(a)(15)(L) of the Act;
- (3) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;
- (4) The statement of facts contained in the petition was not true and correct; or
- (5) Approval of the petition involved gross error; or
- (6) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

The primary issue in this proceeding is whether the petitioner has provided sufficient evidence to overcome the adverse information described in a memorandum dated January 26, 2005, which was issued by a U.S. consular officer employed at the U.S. embassy in Tashkent, Uzbekistan.

The memorandum in question contained the following account of the relevant information that lead to the director's ultimate revocation of the approval of the nonimmigrant visa:

1. During a January 26, 2004 visa interview, the beneficiary was unable to articulate the business connection with his alleged enterprise, Tashkent Times, located in Uzbekistan and the U.S. entity that filed the nonimmigrant visa petition on behalf of the beneficiary.
2. On December 20, 2001, the beneficiary was issued a B1/B2 multiple entry visa with a 48-month validity period. The passport with passport no. [REDACTED] was used by the beneficiary to obtain the visitor visa and was valid until July 15, 2014. The beneficiary indicated that his employer at the time was a state run [REDACTED] newspaper. The nonimmigrant visa obtained with this passport was used by the beneficiary to affect entry into the United States on February 15, 2004 as a B-2 visitor.
3. On July 15, 2002, the beneficiary petitioned for another B1/B2 visa with a different passport (passport no. [REDACTED]). The beneficiary identified the same employer in the second application for the nonimmigrant visa. The beneficiary obtained this passport based on the claim that the prior passport with passport no. [REDACTED] was lost or stolen, even though the beneficiary continued using the purportedly lost or stolen passport to affect the February 2004 entry into the United States.
4. A third passport application was submitted by the beneficiary on December 11, 2003. A passport with passport no. [REDACTED] was subsequently issued based on the beneficiary's claim that his passport was out of visa pages.
5. A nonimmigrant visa petition was filed by the petitioner in the instant matter on behalf of the beneficiary for the purpose of obtaining L-1A classification for the beneficiary. In so doing yet another passport belonging to the beneficiary (passport no. [REDACTED]) was used. The memo notes that the beneficiary was denied a visa in January 2004 and consequently used the passport with passport [REDACTED] to enter the United States as discussed in no. 2 above.
6. Based on the beneficiary's possession of several passports and particularly based on his use of a passport, which he claimed lost or stolen, the U.S. consular officer determined that the beneficiary perpetrated passport fraud.
7. Despite the beneficiary's registered position as president of the petitioning entity since February 27, 2002, the beneficiary entered the United States in February of 2004 as a B2 visitor for pleasure.

8. The CIS record of the beneficiary's U.S. admissions and departures indicates that the beneficiary used the lost or stolen passport on the following three dates in order to affect entry into the United States: July 17, 2002, September 3, 2003, and February 15, 2004.¹
9. On May 9, 2003, subsequent to the Diplomatic Security Visa Fraud Division's (DS/CR/VF) investigation of the petitioner, a report was issued indicating that the registered general manager of the petitioner was a conduit for finding illegal employment for out-of-status aliens. The report further stated that the petitioning entity was registered both in Florida and in Nevada and that the Florida location identified the beneficiary as secretary, while the Nevada location identified the beneficiary as president of the petitioner.
10. An investigation showed that the beneficiary's wife [REDACTED] applied for a B1/B2 visa in August and September of 2003 under her maiden name of [REDACTED]. On the first visa application, [REDACTED] stated that she and her husband owned a family pharmacy. On the second visa application the same applicant stated that she was a photojournalist with the [REDACTED] newspaper and that the purpose for her visit was business-related. [REDACTED] did not indicate her husband's whereabouts despite his entry into the United States on September 3, 2003. The report further discussed [REDACTED] failure to indicate that [REDACTED] was her maiden name and that she assumed the name [REDACTED] subsequent to her marriage to the beneficiary, which took place on September 28, 2002.
11. The memo indicated that the adverse information discussed in nos. 1-10 was not available to CIS during the time of its August 17, 2004 approval of the petitioner's Form I-129.

On April 1, 2005, the director issued a notice of intent to revoke (NOIR) approval of the petitioner's nonimmigrant visa petition. The contents of the above described memo were recited. The director also noted that upon conducting a personal interview with the beneficiary, the consulate office in Uzbekistan discovered that the petitioner was ineligible to classify the beneficiary as an intracompany transferee because it lacked the requisite qualifying relationship with the beneficiary's foreign employer. Thus, the issue of the petitioner's ineligibility served as the basis for the director's decision to issue a NOIR. The petitioner was allowed 30 days to address the adverse evidence provided in the consulate report and to overcome the director's determination regarding the lack of a qualifying relationship with the beneficiary's foreign employer.

In response, counsel for the petitioner provided a letter dated May 1, 2005 in which he raised a number of claims in defense to the adverse evidence presented in the NOIR. Namely, counsel claimed that the consular officer at the U.S. embassy in Tashkent, Uzbekistan was biased against the beneficiary and his wife for unknown reasons. Counsel provided a detailed account of the interactions between the consulate official and the beneficiary's wife at the time of her interview regarding derivative status as an L-2 nonimmigrant.

Counsel then discussed the beneficiary's academic and professional achievements, none of which were corroborated with supporting documentation. Counsel also claimed that the consulate official failed to ask any questions regarding the petitioner's connection with the beneficiary's alleged business abroad. However,

¹ The memo states that the date of the third entry was in 2003. The AAO notes that this was apparently a typographical error and provides the proper entry date of February 15, 2004.

the petitioner provided no additional evidence regarding its alleged qualifying relationship with the beneficiary's foreign employer.

Counsel claimed that instead of asking questions regarding the petitioner's eligibility to employ the beneficiary as an L-1A intracompany transferee, the consulate officer questioned the U.S. petitioner's employment of foreign students. While the reasoning for the consulate officer's line of questioning may not have been apparent to the beneficiary and his counsel, the record strongly suggests that the consulate officer's questions were aimed at eliciting further information to determine whether fraud had been perpetuated on the U.S. government by virtue of illegally obtaining nonimmigrant visas. This would explain the consulate officer's questions regarding the petitioner's employment of foreign students who generally don't have a right to employment in the United States unless that right is specifically granted. The consulate official was apparently attempting to determine whether the beneficiary was knowingly engaged in obtaining illegal employment for nonimmigrants who have no legal right to such employment by virtue of their visa restrictions.

With regard to the lost or stolen passport, counsel asserted that the beneficiary made no such claims and provided what he claimed to be a letter from the Uzbek Passport and Citizenship Authority (UPCA). In support of his claim, the petitioner provided a letter from the [REDACTED]. The contents of the letter merely indicate that any issuance of a passport to the beneficiary was done pursuant to the Passport System Law of the Republic of Uzbekistan and that the beneficiary was not in the police list of wanted people. However, nothing in the letter directly disputes the allegation that the beneficiary fraudulently obtained multiple Uzbek passports, which were then used for the beneficiary's multiple attempts to obtain visas. The government of Uzbekistan would have no record of the beneficiary's numerous visa petitions which accompanied the variety of passports issued. Only the U.S. government would have record of the specific passport number that accompanied each visa petition. As the visa petitions were not the concern of the Uzbek government, the beneficiary's illegal use of a passport may only be uncovered by the Internal Affairs Ministry if notified by a U.S. government official. In other words, it is likely the Uzbek government would remain unaware of whether the beneficiary's passports were truly lost or stolen unless presented evidence that the beneficiary continued to use them to apply for U.S. visas.

Furthermore, the information regarding the beneficiary's claim of a lost or stolen passport was passed on to the U.S. consulate by the Uzbek government. Thus, counsel's current statements that the beneficiary did not make such a claim are not persuasive. The record clearly shows that the beneficiary obtained a total of four passports, three of which were obtained within a relatively brief period and that at least three of those passports were used in attempts to obtain U.S. visas. It appears at the very least that the beneficiary obtained new passports without having turned in or cancelled the prior passports.

Finally, counsel stated that the beneficiary had no choice but to enter the United States using his nonimmigrant visitor visa due to the lack of cooperation from the U.S. consulate, which refused to issue the beneficiary an L-1 visa. Counsel denied that the beneficiary misrepresented the reasons for any of his visits to the United States and stated that CIS failed to provide any specific evidence or make specific allegations of fraud on the part of the beneficiary. However, counsel's own account of the facts suggests that at the very least the beneficiary's latest entry into the United States was unlawful as a result of his admitted use of a visitor visa to enter the United States with the intent to work for the U.S. entity. See 8 C.F.R. § 214.2(b).

Although counsel commented on CIS's approval of the visa petition based on the determination that the petitioner was eligible to classify the beneficiary as an L-1A nonimmigrant, the regulations clearly provide for revocation of prior approvals, particularly where eligibility was determined without CIS's knowledge of the adverse information discussed in the instant matter. *See* 8 C.F.R. § 214.2(l)(9)(iii)(4).

On May 10, 2005, the director revoked the August 17, 2004 approval of the petitioner's Form I-129. The director stated that the petitioner's rebuttal to the NOIR consisted primarily of issues that should have been brought before the U.S. consulate office and concluded that the U.S. consulate's adverse findings, which included the determination that the petitioner lacks the necessary qualifying relationship with the beneficiary's foreign employer, served as proper grounds for revoking the previously approved nonimmigrant petition.

On appeal, counsel vehemently objects to the director's decision to revoke approval of the petition solely based on the findings of the U.S. consulate in Tashkent. Most specifically, counsel objects to the director's presumption that the petitioner would be unable to overcome the adverse findings discussed in the NOIR. However, despite the adverse finding on an issue directly related to the petitioner's eligibility, the petitioner failed to submit sufficient evidence to establish that it had a qualifying relationship with the beneficiary's foreign employer at the time of filing and at the time of the beneficiary's interview with the U.S. consulate officer in Tashkent.

The regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States.

Thus, in order to meet the requirement discussed in 8 C.F.R. § 214.2(l)(3)(i) the petitioner must establish that it has a qualifying relationship with the beneficiary's alleged foreign employer, which in the instant matter is claimed to be the *Tashkent Times* newspaper located in Uzbekistan.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also*

Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the instant matter, the petitioner claims to have an affiliate relationship with the beneficiary's foreign employer. The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

Affiliate means:

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In support of the claim regarding the alleged affiliate relationship, the petitioner provided an operating agreement of the foreign entity where the beneficiary was identified as the company's sole capital contributor. However, with regard to the petitioner, the only document establishing ownership is a single stock certificate identifying the beneficiary as the owner of all of the petitioner's outstanding stock. Although the petitioner provided one page of its tax return also identifying the beneficiary as its owner, the complete tax return was not provided. As such, the petitioner is asking CIS to make assumptions as to the tax year the tax return is accounting for and to assume that the tax return was filed at all. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). A single page from an unidentified and possibly nonexistent tax return cannot be deemed documentary evidence. As such, the AAO finds that the record lacks sufficient documentation to establish the beneficiary's claimed ownership of the petitioning entity.

Thus, even if the record were devoid of any evidence regarding the beneficiary's perceived motives and possession of multiple Uzbek passports, the record strongly suggests that CIS's approval of the petition based on the submissions provided in support of the petition was done in gross error. That being said, a thorough review of the record indicates that the petitioner failed to establish its eligibility at the time of filing based on additional grounds that were not addressed in the director's revocation.

More specifically, the record suggests that the petitioner failed to meet the requirement discussed in 8 C.F.R. § 214.2(l)(3)(ii), which addresses the employment capacity of the beneficiary's proposed position in the United States.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the instant matter, the discussion of the beneficiary's proposed employment is limited to the general statement of responsibilities provided by counsel in support of the petition. More specifically, counsel stated that the beneficiary's

responsibilities would include overseeing the petitioning operation by directing the management and developing and strengthening business contacts. However, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What would the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As the petitioner failed to identify any actual duties associated with the broad job responsibilities provided in the support letter, the AAO is unable to conclude that the beneficiary's duties would primarily be within a qualifying capacity.

Additionally, 8 C.F.R. § 214.2(l)(3)(iv) indicates that the petitioner's eligibility depends in part on its ability to establish the beneficiary's qualifying employment abroad. In counsel's support letter submitted with the Form I-129, counsel stated that the beneficiary was employed abroad as the foreign entity's general manager and chief executive. He indicated that the beneficiary was responsible for "establishing the company's vision, directing its management and evolution, developing its marketing and promotional strategy, and overseeing the entire operation." The petitioner also provided a letter dated October 30, 2003 from the foreign entity's assistant director of commerce, who reiterated counsel's statements regarding the oversight and direction of management. He also stated that the beneficiary's oversight included ensuring that the stories of the *Tashkent Times* were objective, accurate, and newsworthy. He indicated that the beneficiary's job duties included investigation and reporting of stories considered to be of high importance.

Thus, the record suggests that the beneficiary's foreign position, at least in part, included job duties of a non-qualifying nature, as the beneficiary was required to actually perform a service. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the record is just as ambiguous about the beneficiary's foreign job duties as it is about his proposed job duties with the U.S. petitioner. Again, specifics, however, are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Without a more detailed account of the beneficiary's job duties abroad, the AAO is unable to determine that his position consisted primarily of qualifying tasks.

It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). As such, due to the additional grounds of ineligibility discussed above, this petition should not have been approved. Accordingly, CIS's approval of the petitioner's nonimmigrant L-1A visa petition was as a result of gross error. See 8 C.F.R. § 214.2(l)(9)(iii)(5).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for such decision. In visa petition proceedings, the burden of proving

eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.